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Fraudulent bank orders

The inattentive lawyer is responsible

Par Célian Hirsch le 6 December 2024

A lawyer specializing in banking law, who agrees with his client that he will receive banking correspondence on his behalf, should be able to detect the unusual nature of fraudulent orders. If he fails to do so, he may incur contractual liability and must compensate the client (4A_269/2024).

A Geneva lawyer specializing in banking law sets up and manages a Panamanian company for a French businessman. The company opens a bank account in Geneva. The contract stipulates that correspondence is to be sent to the lawyer and the external manager, but not to the client.

The external manager forges the businessman's signature in order to empty the company's bank account. Debit notices and a note closing the account and selling all positions are sent to the lawyer. The lawyer did not react.

The Panamanian company sued the bank for payment of the amounts stolen by the manager, but was unsuccessful. Despite the bank's serious misconduct, the company should have contested the disputed transactions which had been notified to the lawyer (4A_161/2020 ; cf. also. Liegeois Fabien/Hirsch Célian, Ordres bancaires frauduleux : discours de la méthode, SJ 2021 p. 117 ff).

The company and the client sued the lawyer for EUR 1,365,000. Due to an arbitration clause in the retainer agreement, arbitration proceedings were held in Geneva with a sole arbitrator. The award condemned the lawyer to pay the client EUR 755,000. In summary, the arbitrator considered that the lawyer, who was well versed in banking law, should have detected the unusual nature of the debit notices received at his office and alerted his client. This failure constitutes a breach of the retainer agreement, qualified as serious misconduct. The arbitrator considers that the serious faults committed by the manager and the bank create an imperfect solidarity within the meaning ofart. 51 CO. These faults do not mitigate, or even exclude, the lawyer's liability. However, the client was also the cause of the damage, and the lawyer received only a small fee. The arbitrator therefore reduced the amount awarded to 55 % of the damages in accordance with art. 43 ff. CO.

Dissatisfied with this award, the lawyer appealed to the Swiss Federal Supreme Court.

In international arbitration, the Federal Tribunal reviews the contested award only from the restricted angle of the grounds provided for inart. 190 para. 2 of the LDIP. In addition, arbitration

appeals are subject to more stringent requirements as to the grounds on which they must be based.

In this case, the lawyer argues that the award is incompatible with substantive public policy (art. 190 al. 2 let. e LDIP). This criterion is considerably more restrictive than arbitrariness. An award is incompatible with public policy only if it disregards the essential and widely recognized values which, according to the prevailing conceptions in Switzerland, should form the basis of any legal order. *In casu*, the Federal Court criticized the lawyer for "obviously confusing it (…) with a court of appeal which would freely review the merits of awards in international arbitration". The arbitrator held that the lawyer had wrongfully caused damage to his client by breaching a contractual obligation, and that the faults of the manager and the bank did not make it possible to exclude or mitigate his liability. This result is in no way contrary to substantive public policy. The Federal Court therefore dismissed the appeal.

This is the first ruling by the Federal Supreme Court concerning the liability of lawyers for fraudulent bank orders. Given the Federal Court's extremely limited power of review in international arbitration matters, this ruling offers only limited lessons. We shall confine ourselves to two observations.

Firstly, this ruling highlights the danger for lawyers of agreeing to receive banking documentation on behalf of their clients. A lawyer who nevertheless accepts this task may then have to check the documents received to identify, at the very least, any unusual orders. In our opinion, it is not out of the question, depending on the circumstances, for his duty to be limited not only to unusual orders, but also to questionable ones. Indeed, the rules of the mandate impose a duty of diligence, which may include checking, even quickly, the banking documentation received for the client. The lawyer would therefore be well advised to contractually limit his liability to the client (within the meaning of art. 100 and 101 of the Swiss Code of Obligations), as banks do in practice (cf. Liegeois/Hirsch, *op. cit.*). Otherwise, the client will find it easier to turn against his lawyer than against his bank. In this case, the arbitral tribunal had found that the lawyer was guilty of serious misconduct, which did not allow it to exclude his liability by agreement.

Secondly, this ruling serves as a reminder that the perpetrator of a loss cannot always successfully argue for the mitigation or even exclusion of liability solely because other persons are also responsible for the loss. In principle, multiple perpetrators benefit the injured party. He or she is free to attack one or more responsible parties (external relationships), and it is up to them to take action against their co-perpetrators (internal relationships). Only in exceptional cases is the gross negligence of a third party of such importance that it stands out as the most immediate cause of the damage, relegating other factors that contributed to causing it to the background. In this case, the faults of the manager and the bank, however serious, did not allow the lawyer to mitigate or exclude his liability.

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